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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF ANN ARBOR, EDWARD PIERCE and WILLIAM CORBETT,
Petitioners,

vs.

KAREN CHRISTY, Individually and As Sole Shareholder of UNIQUE CREATIONS, INC.,
Respondents.

PETITION FOR CERTIORARI TO REVIEW DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IN CASE NO. 86-1172 AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1. DOES THE FIRST AMENDMENT GUARANTEE THE EXISTENCE OF "ADULT BOOKSTORES" AS THE PRINCIPAL MEANS FOR DISTRIBUTING SEXUALLY EXPLICIT MATERIAL?

2. IS A ZONING ORDINANCE WHICH RESTRICTS "ADULT BOOKSTORES" TO LIMITED ZONES AND ALLOWS ALL STORES IN THE CITY TO CARRY UP TO 20% OF THEIR RETAIL STOCK IN "ADULT MATERIALS" AN UNCONSTITUTIONAL, CONTENT BASED INFRINGEMENT ON THE RIGHT TO FREEDOM OF SPEECH?

3. DOES A CITY HAVE THE BURDEN OF PRESENTING PROOF TO "JUSTIFY" ANY ORDINANCE WHICH REGULATES BUSINESSES ENGAGED IN SOME FORM OF EXPRESSION?

4. IF THE ANSWER TO QUESTION NO. 3 IS AFFIRMATIVE, MUST JUSTIFICATION OCCUR IN EVERY PROCEEDING WHERE ENFORCEMENT OF THE ORDINANCE IS AN ISSUE?

5. CAN A PARTY ATTACKING THE VALIDITY OF ADULT BOOKSTORE ZONING REGULATIONS MEET ITS BURDEN OF PROOF SIMPLY BY SHOWING THE PERCENTAGE OF LAND AREA WHERE ADULT BOOKSTORES ARE PERMITTED?

LIST OF PARTIES

Petitioners are the City of Ann Arbor, Edward Pierce (former Mayor) and William Corbett (Police Chief). Petitioners were the Defendants in the trial court and the Appellees before the Sixth Circuit Court of Appeals. Petitioners are represented by the undersigned Office of the City Attorney.

Respondents are Karen Christy and Unique Creations, Inc., a Michigan corporation. Respondents were the Plaintiffs in the trial court and the Appellants before the Sixth Circuit Court of Appeals. The counsel for Respondents before the Court of Appeals was Michael Null, Suite 700, 155 North Michigan Avenue, Chicago, Illinois 60601. Before the trial court, Respondents were represented by Mr. Null and by Anita McIntyre, 18164 Mack Avenue, Grosse Pointe, Michigan 48224. Just prior to oral argument, Mr. Null was permitted to withdraw as counsel. Petitioner has not been notified of any substitute counsel for Respondents.

TABLE OF CONTENTS

Questions Presented for Review I

List of Parties II

Index to Authorities IV

Official Reports of Opinions 1

Jurisdiction of the United States Supreme Court 1-2

Constitutional Provisions 2

Statement of the Case 3

Argument 10

I The First Amendment Does Not Institutionalize the Adult Bookstore As a Means of Expression 10

II The First Amendment Only Requires That Legislation Be Justified If There Is an Exclusion of a Broad Category of Protected Expression 14

III A Percentage of Land Area Analysis Is Insufficient to Show That an Ordinance Is Overly Restrictive 19

Relief 21

Appendix—

Decision of United States Court of Appeals for the Sixth Circuit, *Christy* v *City of Ann Arbor*, No. 86-1172 ..... A1

Memorandum Opinion and Order of the United States District Court, Eastern District of Michigan, Southern Division, *Christy* v *City of Ann Arbor*, No. 85 CV-60352-AA A12

Mandate Issued by United States Court of Appeals for the Sixth Circuit, *Christy* v *City of Ann Arbor*, No. 86-1172 ..... A30

INDEX TO AUTHORITIES

Cases

Bates v *State Bar of Arizona*, 53 L Ed 2d 810, 97 S Ct 2691, 51 Ohio Misc 1, 5 Ohio Ops 3d 60 11-12

BSA, Inc v *King County*, 804 F2d 1104 (9th Cir 1986) 15

Chaplinsky v *New Hampshire*, 315 US 568, 86 L Ed 1031, 62 S Ct 766 11

Christy Newsreel Services, Inc v *City of Ann Arbor*, Number *85-1510* 18

Christy v *City of Ann Arbor*, 824 F2d 489 (1987) 1

Christy v *City of Ann Arbor*, 625 F Supp 960 (ED Mich, 1986) 1

City Council v *Taxpayers for Vincent*, 466 US 789, 80 L Ed 2d 772, 104 S Ct 2118 (1984) 12-13

City of Renton v *Playtime Theaters*, 475 US 41, 89 L Ed 2d 29, 106 S Ct 925 (1986) ..... *passim*

CLR Corp v *Henline*, 520 F Supp 760 (WD Mich, 1981) 15, 16

CLR v *Henline*, 702 F2d 637 (6th Cir, 1983) 5, 8, 15, 16

FCC v *Pacifica Foundation*, 438 US 726, 57 L Ed 2d 1073, 98 S Ct 3023 10

Gertz v *Robert Welch, Inc*, 418 US 323, 41 L Ed 2d 789, 94 S Ct 297 12

Heffron v *International Society for Krishna Consciousness, Inc*, 452 US at 647, 69 L Ed 2d 298, 101 S Ct 2559 13

Kovac v *Cooper*, 336 US 77, 93 L Ed 513, 69 S Ct 448 (1949) 10

Krueger v *City of Pensacola*, 759 F2d 851, 855 (11th Cir, 1985) 15, 16

Metromedia, Inc v *City of San Diego*, 453 US 490, 69 L Ed 2d 800, 101 S Ct 2882 (1981) 12, 13

Miller v *California*, 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607 12
Red Lion Broadcasting Co v *FCC*, 395 US 367, 23 L Ed 2d 371, 89 S Ct 1794 (1969) 12
Schad v *Burrough of Mt Ephraim*, 452 US 61, 68 L Ed 2d 671, 101 S Ct 276 (1981) ..... *passim*
Schenck v *United States*, 249 US 47, 63 L Ed 470, 39 S Ct 247 11
United States v *O'Brien*, 391 US 367 (1968) 17
Wooley v *Maynard*, 430 US 705, 715 (1977) 8
Young v *American Mini Theatres, Inc*, 427 US 50, 49 L Ed 2d 310, 96 S Ct 2440 (1976) ..... *passim*

Statutes

28 USC 1254 1
28 USC 1343(3) 4
28 USC 1343(4) 4
28 USC 2201 4
28 USC 2202 4
42 USC 1983 4

United States Constitution

Fifth Amendment 4
First Amendment ..... *passim*
Fourteenth Amendment 2, 4

Other

Ann Arbor City Code, §5:50 ..... 3, 4
The Supreme Court - Leading Cases, 100 Harv L Rev 100, 182-90 (1986) 8

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OFFICIAL REPORTS OF OPINION

The opinion of the Court of Appeals is reported as *Christy* v *City of Ann Arbor*, 824 F2d 489 (1987). That opinion arises out of an appeal from the District Court decision reported as *Christy* v *City of Ann Arbor*, 625 F Supp 960 (ED Mich, 1986).

JURISDICTION OF THE UNITED STATES SUPREME COURT

The decision on which review is sought was made and filed on July 23, 1987. There is no order respecting a rehearing. 28 USC 1254 confers jurisdiction on this Court to review the decision in question by writ of certiorari. It states in part:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decision. . . ."

CONSTITUTIONAL PROVISIONS

This case raises questions of whether an ordinance of the City of Ann Arbor violates rights of free expression guaranteed by the United States Constitution. The right to freedom from State government action which unreasonably interferes with expression is a liberty guaranteed by the Fourteenth Amendment to the Constitution. Section one of that amendment reads as follows:

"SEC. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The liberties guaranteed by the Fourteenth Amendment have been interpreted to include protection similar to that provided by the First Amendment. It reads as follows:

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

STATEMENT OF THE CASE

Respondents (referred to in the remainder of the petition as "Christy") wish to operate an "adult bookstore" in Ann Arbor at a location which is not zoned for "adult entertainment businesses."

Ann Arbor's zoning chapter addresses adult entertainment businesses in §5:50. That section defines "adult bookstore" as:

> "An establishment having as a principal activity the sale of books, magazines, newspapers, video tapes, video discs and motion picture films which are characterized by their emphasis on portrayals of human genitals and pubic regions or acts of human masturbation, sexual intercourse or sodomy."

A "principal activity" is "[a] use accounting for more than 20 percent of a business' stock in trade, display space, floor space or movie display time per month." The zoning chapter then states that such businesses may be located in the City only in accordance with the following restrictions:

> "(a) No such business shall be located within 700 feet of a district which, pursuant to this chapter, has been classified R1A, R1B, R1C, R2A, R2B, R3, R4A, R4B, R4C, R4C/D or R6.
>
> (b) Such businesses shall only be located in a district classified pursuant to this chapter as C2A.
>
> (c) No such business shall be established within 700 feet of another adult entertainment business."

The C2A zoning classification where adult entertainment businesses may be located is the classification for

the central business district areas of Ann Arbor. The location where Christy wished to open an adult bookstore is in a C2B/R (mixed business/residential zone) just north of the central business district.

Christy filed suit in federal district court asking that the adult entertainment provisions of the Ann Arbor zoning chapter be declared unconstitutionally restrictive and seeking preliminary and permanent injunctive relief. The complaint purported to invoke jurisdiction pursuant to 28 USC 1343(3), 1343(4), 2201 and 2202; 42 USC 1983 and the First, Fifth and Fourteenth Amendments to the United States Constitution. Attached to the complaint were a copy of the Ann Arbor zoning map and the affidavit of a geographer. In the affidavit the geographer did an analysis of the Ann Arbor zoning maps and other sources of information and, based on the above three location criteria, made findings which can be summarized as follows.

(1) Ann Arbor contains approximately 25.3 square miles.

(2) The area where a new adult entertainment business may be located under §5:50 totals approximately .058 square miles.

(3) The percentage of land in Ann Arbor where a new adult entertainment business may lawfully locate is approximately .23 of one percent.

Based solely on the complaint and its attachments, Christy moved for a preliminary injunction. The City contended that the area analysis was insufficient to show that the ordinance was overly restrictive, and that the fact that the ordinance allowed any business premises to have 20 percent of its trade in adult materials resulted in no significant restriction on freedom of expression.

The district judge rendered an opinion denying the motion for preliminary injunction and stated:

> "After reviewing these authorities and the evidence before it, the Court finds that the Ann Arbor ordinance is not greatly restrictive of First Amendment rights. Ann Arbor's unique provisions that allow businesses up to 20% of their stock in trade, etc., in adult materials, without imposing any zoning regulation, gives the public easy access to these materials. As Justice Powell noted in *Young*, the principal First Amendment concern is the need to maintain free access of the public to these materials. *Young*, 427 US at 77. The Court is satisfied that the Ann Arbor ordinance meets this important obligation.
>
> "The Ann Arbor ordinance permits anyone to speak by allowing stores to carry up to 20% adult wares. The ordinance guarantees the right of merchants to sell these materials. The City also shows that it has no evil intention to eliminate the sale of this kind of material. This answers the Sixth Circuit's concern that the City might have enacted the ordinance to prevent the sale of adult books. *Henline*, 702 F2d at 639.
>
> "The 20% requirement provides a beneficial way for decentralization of the adult book business. By sanctioning the selling of adult books and other books together, the City has eliminated most of the well-known problems of urban blight that result from concentrations of these bookstores without sacrificing its citizens' First Amendment freedoms. There is no question that this ordinance allows a 'myriad of locations' for the sale of adult books.

> "For those bookstores that wish to sell only adult books, thus violating the 20% requirement and subjecting themselves to regulation by the ordinance, the Defendant City has provided two zones where these stores can locate. Plaintiffs' evidence that these two zones comprise only a small percentage of the surface of the City is irrelevant. The relevant fact before the Court is that the distribution of adult books is not limited by the ordinance authorizing zones for strictly adult stores. The Court also notes that in an earlier case brought by this same Plaintiff, a total of 14 sites for adult bookstores were shown by the Plaintiff to be available in the City of Ann Arbor . . . Furthermore, the City asserts that there are numerous locations within it which are available for adult bookstores. The ordinance does not constitute an absolute ban on adult business under *Schad*."

Christy appealed the trial judge's decision to the 6th Circuit Court of Appeals. The *sole* issue raised on appeal was whether the ordinance was overly restrictive. The statement of issues in Christy's brief was:

> "Is the Appellant, who seeks to open and operate an adult bookstore, entitled to a preliminary injunction enjoining enforcement of a municipal zoning ordinance limiting adult businesses to 0.23% of the land area in the City on the basis of Appellant's likelihood of succeeding on the merits in having the ordinance declared unconstitutionally restrictive?"

Just prior to the day scheduled for oral argument, counsel for Christy filed a motion requesting permission to withdraw as counsel and requesting an adjournment until Christy retained new counsel. Ann Arbor objected

to a rescheduling of the hearing. The Court then allowed counsel for Christy to withdraw and indicated that it would consider the matter without oral argument.

The Court of Appeals rendered its opinion on July 23, 1987. It ruled that, in determining whether the ordinance was overly restrictive, the district court could not rely on the fact that any store could carry up to 20 percent of its stock in sexually explicit materials. In this regard, it stated:

> "The district court's reasoning seems to be that a city can set an arbitrary limit on the amount of adult materials sold in bookstores, and such a limitation is not greatly restrictive of first amendment rights as long as *some* adult materials are still available. However, a city cannot arbitrarily limit the exercise of first amendment rights. Nonobscene, erotic materials are a form of protected expression under the first amendment."
>
> * * *
>
> "It is clearly *quite* restrictive to permit a business to engage in that protected expression only 20 percent of the time. To demonstrate the fallaciousness of the district court's reasoning, imagine an ordinance allowing book stores to sell nonfiction only if they limit nonfiction to 20 percent of their business. No one could argue that such an ordinance would not limit the sale of histories, biographies, newspapers and magazines.
>
> "A limitation of adult materials to 20 percent of a bookseller's wares conditions the constitutional right to speak in one way on the bookseller's willingness to speak in a different way 80 percent of the time. This

is a severe restriction of first amendment rights. The Supreme Court has not permitted the states to condition even the right to drive a car on a person's willingness to express certain ideas, *Wooley* v *Maynard,* 430 US 705, 715 (1977); certainly the right to engage in one constitutionally protected form of expression cannot be conditioned on participation in other, government-approved, forms of expression. See *The Supreme Court - Leading Cases,* 100 Harv L Rev 100, 182-90 (1986). We therefore reject the district court's conclusion that the distribution of adult books is not restricted by an ordinance which purports to regulate only strictly adult bookstores."

Although the issue had not been raised by the parties, the Court also ruled that the district court had erred by not requiring the City to meet its burden of proof to "justify" the ordinance.

"Although both the Supreme Court in *Renton,* 106 S Ct at 931, and the Sixth Circuit in *CLR* v *Henline,* 702 F2d at 639, have stated that a city need not conduct new independent studies to justify adult business zoning ordinances, both courts have required some relevant evidence to demonstrate that the zoning ordinance was intended to address the secondary effects of adult businesses. The burden of proof is on the city to show that more than a rational relationship exists between the ordinance and this government interest."

Senior Circuit Judge Bailey Brown wrote an opinion concurring in part and dissenting in part. With regard to the 20 percent rule, he stated:

"As the majority correctly notes, a case raising issues of a zoning ordinance's constitutionality must be de-

cided according to its specific facts. In the present dispute, the ordinance at issue applies to only those businesses which have more than twenty percent (20%) of their stock in trade in adult materials. Thus, through scores of other businesses, all throughout Ann Arbor, whose stock in trade in adult materials may amount to 20% or less of their total stock, the public can have easy access to such materials. In so stating, I assume that if the demand is there, the businesses will accordingly respond.

"Further, although adult businesses can operate in only a small percentage of the Ann Arbor area, their existence under the ordinance is simply not harshly restrained. The districts where the adult businesses may locate under the ordinance are in the heart of Ann Arbor within the city's central business zone - hardly a remote area. The districts seem to be commercially viable locations for adult enterprises and the plaintiff has not shown otherwise. The Ann Arbor ordinance merely regulates the location of such enterprises; it does not, for all practical purposes, eliminate them."

However, he agreed that the City had the burden of presenting evidence to justify the ordinance based on the purpose in enacting it.

"However, I agree with the majority's conclusion that the district court abused its discretion in denying the plaintiff's motion for a preliminary injunction, since there is no evidence in the record which demonstrates Ann Arbor's alleged purpose in enacting the ordinance to avoid urban blight. Upon remand, Ann Arbor may present proof of its alleged goal to justify what I view, under the present facts, as a slight infringement of first amendment freedom."

ARGUMENT

I The First Amendment Does Not Institutionalize the Adult Bookstore As a Means of Expression. (Issues 1 & 2)

In this portion of the petition we will assume, solely for purposes of argument, that the Ann Arbor ordinance severely restricts or bans adult bookstores as a means of distribution of sexually explicit materials. This raises the question of whether such a restriction is permissible if adequate alternative means for this form of expression are permitted. The effect of the Court of Appeals' decision is to reject any ordinance that has the effect of prohibiting any business from selling one hundred percent sexually explicit materials. However, such a conclusion appears to be a wholly unwarranted interpretation of the First Amendment.

The Supreme Court has long recognized that reasonable time, place and manner restrictions may be placed on methods of expression to protect the rights of others. *Kovac* v *Cooper,* 336 US 77, 93 L Ed 513, 69 S Ct 448 (1949). Moreover, those regulations need not be absolutely blind with regard to the content of the expression. See *FCC* v *Pacifica Foundation,* 438 US 726, 744-745, 57 L Ed 2d 1073, 1090-1091, 98 S Ct 3023, where the court stated:

> "The order must therefore fall if, as Pacifica argues, the First Amendment prohibits all governmental regulation that depends on the content of speech. Our past cases demonstrate, however, that no such absolute rule is mandated by the Constitution.

"The classic exposition of the proposition that both the content and the context of speech are critical elements of First Amendment analysis is Mr. Justice Holmes' statement for the Court in *Schenck* v *United States*, 249 US 47, 52, 63 L Ed 470, 39 S Ct 247:

> 'We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words
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> [438 US 745]
>
> that may have all the effect of force. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.'

"Other distinctions based on content have been approved in the years since *Schenck*. The government may forbid speech calculated to provoke a fight. See *Chaplinsky* v *New Hampshire*, 315 US 568, 86 L Ed 1031, 62 S Ct 766. It may pay heed to the '"common sense differences" between commercial speech and other varieties.' *Bates* v *State Bar of Arizona*, supra, at 381, 53 L Ed 2d 810, 97 S Ct 2691, 51 Ohio Misc 1, 5 Ohio Ops 3d 60. It may treat libels against private citizens more severely than

libels against public officials. See *Gertz* v *Robert Welch, Inc,* 418 US 323, 41 L Ed 2d 789, 94 S Ct 297. Obscenity may be wholly prohibited. *Miller* v *California,* 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607. And only two Terms ago we refused to hold that a 'statutory classification is unconstitutional because it is based on the content of communication protected by the First Amendment.' *Young* v *American Mini Theatres, Inc, supra,* at 52, 49 L Ed 2d 310, 96 S Ct 2440."

The Court of Appeals stated that the right to engage in one form of expression cannot be conditioned on participation in another form. The Ann Arbor ordinance, however, does not require a person selling sexually explicit materials to engage in any other form of expression. However, it should be noted that such a condition would not in all circumstances be held unconstitutional. See *Red Lion Broadcasting Co* v *FCC,* 395 US 367, 23 L Ed 2d 371, 89 S Ct 1794 (1969), which upheld the fairness doctrine. This Court has held that where justified by an appropriate governmental interest, certain methods of communication may be entirely banned. A majority of the Supreme Court has agreed that billboards may be banned throughout a city. *Metromedia, Inc* v *City of San Diego,* 453 US 490, 69 L Ed 2d 800, 101 S Ct 2882 (1981). A similar decision was made with regard to handbills on utility poles in *City Council* v *Taxpayers for Vincent,* 466 US 789, 80 L Ed 2d 772, 104 S Ct 2118 (1984).

In *Taxpayers for Vincent,* the Court noted:

"The District Court found that the signs prohibited by the ordinance do constitute visual clutter and

> blight. By banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy. The plurality wrote in *Metromedia*: 'It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an "esthetic harm." ' 453 US, at 510, 69 L Ed 2d 800, 101 S Ct 2822. The same is true of posted signs." 466 US 808, 80 L Ed 2d 789.

The blight caused by adult bookstores and movie houses has been recognized by this court in *American Mini Theatres, supra,* and *City of Renton* v *Playtime Theaters, Inc, supra.* It would appear, therefore, that the proliferation of such facilities can be restricted if alternate means of access to the same information are provided.

As this Court in *Taxpayers for Vincent* said:

> "While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, *Heffron* v *International Society for Krishna Consciousness, Inc,* 452 US, at 647, 69 L Ed 2d 298, 101 S Ct 2559, a restriction on expressive activity may be invalid if the remaining modes of communications are inadequate."

This leaves the question of whether the alternate means provided in Ann Arbor are adequate. The Court of Appeals described the twenty percent rule as "arbitrary". However, there was no evidence either that it was arbitrary or that it was unreasonable. Unless a challenged ordinance is now to be presumed invalid, the Plaintiff should first be required to show that alternate means for distributing sexually explicit material are inadequate. If some such evidence of inadequacy had been presented in this case, the City would have presented evidence that

twenty percent was more than enough to accommodate the adult rack, room or sales area for the average book, magazine or video tape store.

As this Court stated in *Young* v *American Mini Theatres*, 427 US 50, 71, 49 L Ed 2d 310, 96 S Ct 2440 and reiterated in *Renton, supra* at 89 L Ed 2d 41, "[T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." The Court of Appeals would apparently limit the experiment to techniques for placement of adult bookstores. This would wholly preclude the beneficial effects of Ann Arbor's ordinance as described by the District Judge. Review by the Supreme Court is needed to determine whether the strictly adult bookstore is an institution whose existence is guaranteed by the First Amendment, or whether the first amendment right of access to such materials may be accommodated in other ways.

II The First Amendment Only Requires That Legislation Be Justified if There Is an Exclusion of a Broad Category of Protected Expression. (Issues 3 & 4)

In *Schad* v *Burrough of Mt Ephraim*, 452 US 61, 67, 68 L Ed 2d 671, 679, 101 S Ct 276 (1981), this Court stated: "The First Amendment requires that there be sufficient justification for the exclusion of a broad category of protected expression as one of the permitted commercial uses in the Burrough." However, the language of the *Schad* decision indicates that a city's duty to "justify" an ordinance only arises after the attack on it has proved that the ordinance causes the exclusion of a broad category of protected expression. Moreover, the case implies that the justification can be by evidence presented at the full trial

on the merits of the ordinance. However, as indicated by the present case and numerous others, the "justification" language of *Schad* has been subjected to many interpretations or misinterpretations. Ann Arbor, and all other cities that try to regulate in this area, are in the position of being asked to justify the ordinance without knowing exactly what that requirement means, when it is required or whether it is even possible to meet the requirement.

In *Krueger* v *City of Pensacola,* 759 F2d 851, 855 (11th Cir, 1985), the court found that the required justification must show the proper intent of the legislative officials. "The government must show that the articulated concern had more than merely factual grounds and that it was a motivating factor in the passage of the legislation." In *CLR* v *Henline,* 702 F2d 637, 639 (6th Cir, 1983), the court also relied on *Schad* in invalidating adult bookstore regulations. The court criticized the *post-hoc* attempt to justify the ordinance. "[T]he district court found no evidence in city council meetings or elsewhere that the ordinance was enacted *for the purpose of* preventing urban blight through deconcentrating restricted uses." The trial court in *Henline* had been even more explicit. "*Young* requires actual state interests, actually considered upon a factual basis before the legislative body at the time the action is taken, not speculation in the course of subsequent litigation." *CLR Corp* v *Henline,* 520 F Supp 760, 768 (WD Mich, 1981).

Other courts, however, have not read such stringent requirements into the *Schad* decision. In *BSA, Inc* v *King County,* 804 F2d 1104, 1111-1112 (9th Cir, 1986), the Court stated:

> "BSA argues that the County's post-facto justification was impermissible. It asserts that a 'claim of

> governmental interest must be supported by empirical factual evidence actually considered at the time an ordinance is passed.' BSA's contention fails on three grounds. First, it is sufficient that the county was able to present some evidence at the time of trial. In *Schad*, 452 US at 72, 101 S Ct at 2184, the Supreme Court implied that a city could have justified its 'substantial restriction of protected activity' by presenting evidence at trial. BSA provides no authority that a legislative body need function like a court of law every time it considers legislation that may implicate the First Amendment."

Under the logic of the *Krueger* or *Henline* decisions, an ordinance could be held invalid because of the expressed or unexpressed thoughts of council members or because the intentions of the council members were not recorded and preserved. However, the identical ordinance could be upheld if the council members followed a carefully prepared script prepared by the City Attorney and recorded by the Clerk. Even then, perhaps, those decisions would provide the basis for allowing the cross-examination of the council members to determine whether the expressed motives were the real motives.

In this case, the Court of Appeals relied on *City of Renton* v *Playtime Theaters*, 475 US 41, 89 L Ed 2d 29, 106 S Ct 925 (1986) for its conclusion that Ann Arbor had the burden of producing evidence regarding the motives behind the ordinance. However, the *Renton* opinion rejected the relevance of the motives of individual legislators.

> "According to the Court of Appeals, if '*a motivating factor*' in enacting the ordinance was to restrict respondents' exercise of First Amendment rights the

ordinance would be invalid, apparently no matter how small a part this motivating factor may have played in the City Council's decision. 748 F2d at 537 (emphasis in original). This view of the law was rejected in *United States* v *O'Brien*, 391 US 367, 382-386 (1968), the very case that the Court of Appeals said it was applying:

> 'It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . .
>
> * * *
>
> '. . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.'" 475 US ....., 89 L Ed 2d 38.

In the present case, there is no way of knowing what will satisfy the Court of Appeals' requirement for justification. The Ann Arbor ordinance actually evolved over a number of years. Will it be necessary to introduce the records of all the City Council meetings when it was considered? Should the various council members who voted on it testify? If one of the acts of adoption included a statement of purpose, will that suffice? Will it also be necessary to call experts who can show that the ordinance actually works as intended?

Finally, there are the questions of when the justification should occur and why it is needed at all. The hearing which is the basis for finding that the trial judge erred was a half hour long oral argument on whether the calculations of the geographer formed a sufficient

basis for a preliminary injunction. Christy introduced no evidence that anyone would have any difficulty obtaining sexually explicit materials either at the existing adult bookstores or at other stores or video tape rental outlets. They did not raise the issue of whether there was adequate "justification" for the ordinance, and never suggested that the burden of proof had somehow been transferred to the City to "justify the ordinance."

This ordinance has been the subject of evidentiary hearings in at least five different courts. (See, for example, the application for certiorari in *Christy Newsreel Services, Inc* v *City of Ann Arbor,* Number *85-1510.*) In addition, it has been the subject of at least half a dozen prosecutions in the state district court. Should "justification" have occurred in each of these hearings?

Significantly, the lower courts which have suggested stringent justification requirements have not articulated a rationale for the requirement or for the reversal of the burden of proof. It appears that this is because they have read more into the *Schad* decision than is actually there. The trial judge in this case had no reason to require justification, because the Plaintiffs had not come even close to the *Schad* requirement of showing the "exclusion of a broad category of protected expression." To the extent that motives were relevant, he found that the ordinance itself negated "evil intent" by allowing any merchant to sell adult materials.

The split of authorities on the justification issue is an open invitation for unnecessary and burdensome litigation. Moreover, under current decisions, prudence will require legislative bodies to prepare records and follow court type procedures simply to satisfy a misinterpreta-

tion of the *Schad* decision. This situation can be readily corrected through Supreme Court review of the 6th Circuit's decision in this case.

III A Percentage of Land Area Analysis Is Insufficient to Show That an Ordinance Is Overly Restrictive. (Issue 5)

For purposes of argument, it is necessary to assume in this portion of the petition that the First Amendment to the Constitution requires that adult materials be distributed through adult bookstores. This leaves the question of how you determine whether a fair allowance has been made for such businesses. On seeing that a small percentage of the City's land area was available for such businesses, the Court of Appeals jumped to the conclusion that the City now had the burden of justifying the ordinance. This appears to be a big leap. Certainly land area can be a consideration and it was considered by the Court in *Renton, supra,* but it is also necessary to look at what is or is not covered by the restrictions. In this regard, a fair analysis of the Ann Arbor ordinance would have to include the quite limited scope of the businesses defined as adult bookstores. A business fitting the adult bookstore definition of the Detroit ordinance considered in *Young* v *American Mini Theatres, supra,* could be locater in virtually any commercial area of Ann Arbor. This is because the Detroit ordinance broadly covered the type of materials sold to include mere depiction of nudity and it included within the definition of adult bookstore "an establishment with a segment or section devoted to the sale or display of such material," 427 US 53, 49 L Ed 2d 316. In other words, a display rack indicating "adults only" would make the business an adult bookstore in Detroit, but not in Ann Arbor.

While this Court, in *Renton, supra,* indicates that it was not necessary that a city assure a commercially viable location for an adult entertainment business, the fact that a city allows such businesses in prime business locations certainly should be a consideration in determining whether a city is actually attempting to suppress free expression. The nature of the proofs presented by Christy presented nothing to show whether existing adult bookstores provided sufficient access to materials or whether the central business district was not a viable area for a new adult business.

Usually, properly adopted ordinances are presumed constitutional. Unless the First Amendment completely reverses this presumption, a plaintiff claiming that an ordinance is overly restrictive should be required to present proof indicating how the ordinance actually has the effect of suppressing the distribution of materials. The land area analysis employed by Christy in this case does not even give a hint of whether it is difficult or easy to buy adult materials in Ann Arbor. As such proof was lacking, the Court of Appeals erred by returning the matter to the district court with instructions that the City be required to "justify" the ordinance.

Review by this court is necessary to make it clear that the validity of a zoning ordinance which is challenged on first amendment grounds cannot be tested solely by a geographical analysis or by comparison to ordinances considered in other cases. This court can make it clear that the true test is whether there is a substantial restriction on the access to protected materials.

RELIEF

Petitioner, the City of Ann Arbor, Michigan, respectfully requests that this Court issue a writ of certiorari to review the issue presented in this petition.

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Dated: September 25, 1987

APPENDIX

No. 86-1172

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KAREN CHRISTY, individually and as sole shareholder of UNIQUE CREATIONS, INC., a Michigan corporation,
Plaintiff-Appellant,

v.

CITY OF ANN ARBOR, a municipal corporation; EDWARD PIERCE, individually and as MAYOR OF THE CITY OF ANN ARBOR; and WILLIAM CORBETT, individually and as CHIEF OF POLICE OF THE CITY OF ANN ARBOR,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed July 23, 1987

Before: JONES and BROWN, Circuit Judges; and RUBIN, Chief District Judge.*

JONES, Circuit Judge, delivered the opinion of the court, in which RUBIN, District Judge, joined. BROWN, Senior Circuit Judge, delivered a separate opinion concurring in part and dissenting in part.

*Honorable Carl B. Rubin, United States District Court for the Southern District of Ohio, sitting by designation.

JONES, Circuit Judge. Plaintiff, Karen Christy, appeals the district court's order denying her motion for a preliminary injunction. Her motion sought to enjoin temporarily the enforcement of Ann Arbor's adult business zoning regulations on the ground that they unconstitutionally restrict the operation of adult bookstores. Because the district court's decision was premised upon erroneous legal standards and because essential findings lack any support in the record, we vacate the district court's order and remand.

The facts of this case are set forth in the district court's opinion, *Christy* v. *City of Ann Arbor,* 625 F. Supp. 960 (E.D. Mich. 1986). In brief, they are as follows. Plaintiff Christy wishes to operate in Ann Arbor an adult bookstore featuring materials which are sexually explicit but nonobscene in nature. The location where she intends to operate this bookstore is not in an area zoned for "adult entertainment businesses."

Ann Arbour's zoning code addresses "adult entertainment businesses" at section 5.50. An "adult bookstore" is there defined as:

> An establishment having as a principal activity the sale of books, magazines, newspapers, video tapes, video discs and motion picture films which are characterized by their emphasis on portrayals of human genitals and pubic regions or acts of human masturbation, sexual intercourse or sodomy.

A "principal activity" is "[a] use accounting for more than 20 per cent of a business' stock in trade, display space, floor space or movie display time per month." The zoning code then states that such businesses,

> may be located in the City only in accordance with the following restrictions:

(a) No such business shall be located within 700 feet of a district which, pursuant to this Chapter, has been classified R1A, R1B, R1C, R2A, R2B, R3, R4A, R4B, R4C, R4C/D or R6.

(b) Such businesses shall only be located in a district classified pursuant to this Chapter as C2A.

(c) No such business shall be established within 700 feet of another adult entertainment business.

Christy engaged the services of Dr. Edwin Thomas, Professor of Geography at the University of Illinois - Chicago, to survey Ann Arbor to determine the availability of sites complying with the requirements of section 5.50. The results of Dr. Thomas' survey are summarized as follows:

(1) Ann Arbor contains approximately 25.23 square miles;

(2) That area of Ann Arbor where an adult entertainment business may lawfully locate under Section 5.50(2) totals 0.058 square miles;

(3) The percentage of land area in Ann Arbor where an adult entertainment business may lawfully locate is approximately 0.23 (23/100) of 1%.

Christy filed suit in federal district court, asking that the Ann Arbor zoning ordinance be declared unconstitutionally restrictive and seeking an injunction against the ordinance's enforcement. Christy subsequently made a motion to preliminarily enjoin defendant's enforcement of the ordinance pending a final disposition in the case. Plaintiff appeals the denial of that motion under 28 U.S.C. § 1292(a)(1) (1982).

This court may review a district court's grant or denial of a preliminary injunction only to determine whether the district court abused its discretion. *American Motors Sales Corp.* v. *Runke,* 708 F.2d 202, 205 (6th Cir. 1983). "A district court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard." *Christian Schmidt Brewing Co.* v. *G. Heilman Brewing Co.,* 753 F.2d 1354, 1356 (6th Cir. 1985) (citations omitted). *See also* C. Wright & A. Miller, *Federal Practice and Procedure* § 2962 (1973). The court below based its denial of Christy's motion on her failure to fulfill the first requirement for a preliminary injunction—a demonstration of a likelihood of success on the merits. Whether the district court correctly decided that plaintiff was unlikely to succeed on the merits depends upon its correct application of *Young* v. *American Mini Theatres,* 427 U.S. 50 (1976), and its progeny.

In *American Mini Theatres,* the Supreme Court upheld a Detroit zoning ordinance that prohibited the location of adult theatres and bookstores within 500 feet of a residential area and within 1,000 feet of two other "regulated uses."[1] The Court held that this regulation was permissible because the interference with first amendment rights was "slight" in light of the myriad locations in Detroit still available for adult stores, *id.*

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1. An adult bookstore was defined as:

> An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Special Anatomical Areas," (as defined below), or an establishment with a segment or section devoted to the sale or display of such material.

Id. at 53 n.5.

at 71 n.35, and because the ordinance was shown to have the legitimate purpose of preventing urban blight. *Id.* at 71 n.34. The Court noted that the "situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." *Id.* at 71 n.35. The Court employed similar reasoning in *City of Renton* v. *Playtime Theatres, Inc.*, 106 S.Ct. 925 (1986). It stated that the "appropriate inquiry" is whether a zoning ordinance "is designed to serve a substantial government interest and allows for reasonable alternative avenues of communication." *Id.* at 930. The Renton ordinance was upheld because the evidence demonstrated that the city had reviewed relevant studies of other cities before enacting its own "skid row" ordinance and because the city had left open 5 percent (520 acres) of its land for the use of adult businesses.

Although both the Supreme Court's decisions on this issue have held the zoning ordinances to be constitutional, the Sixth Circuit has made it clear that each case must be decided according to its specific facts. In *Keego Harbor Co.* v. *City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981), this court held unconstitutional an ordinance that prohibited the placement of adult theatres within 500 feet of a bar, a church, or a school, or within 250 feet of a residential zone. The court based its holding on the lack of factual support for the city's alleged purpose of preventing "blight" and on the ordinance's effect of totally banning adult theatres. *Id.* at 98. In *CLR Corp.* v. *Henline*, 702 F.2d 637 (6th Cir. 1983), this court again declared a zoning ordinance to be unconstitutional. The ordinance in *Henline* was very similar to the ordinance now in question: it limited adult businesses to the "B-2" business district and required that they be 500 feet from

any church, school, or residence, and 1,000 feet from any other restricted use. The court first pointed out that the ordinance severely restricted first amendment expression because its impact was to permit only two to four restricted uses in a half-mile strip of the 25 square mile city. Second, there was "no evidence in City Council meetings or elsewhere that the ordinance was enacted *for the purpose* of preventing urban blight through deconcentrating restricted uses." *Id.* at 639 (emphasis in original). Although the city need not have conducted its own research on the effect of adult businesses on the city's urban areas, *id.*, the court insisted on some proof that the city was actually attempting to address the problem of urban blight.

In the case before us, the district court applied the two-part analysis required by this line of cases. It examined both the restrictiveness of the zoning ordinance and the city's justification for imposing restrictions. However, the district court made several crucial errors in the course of its examination.

First, the district court principally relied upon the zoning ordinance's applicability only to businesses with more than 20 percent adult wares in order to hold that the ordinance was "not greatly restrictive of first amendment rights." 625 F. Supp. at 966.

> Ann Arbor's unique provisions that allow businesses to have up to 20% of their stock in trade, etc., in adult materials, without imposing any zoning regulation, gives [sic] the public easy access to these materials.
>
> * * *

> By allowing stores to carry up to 20% adult wares, the ordinance guarantees the right of merchants to sell these materials.

Id. The district court's reasoning seems to be that a city can set an arbitrary limit on the amount of adult materials sold in bookstores, and such a limitation is not greatly restrictive of first amendment rights as long as *some* adult materials are still available. However, a city cannot arbitrarily limit the exercise of first amendment rights. Nonobscene, erotic materials are a form of protected expression under the first amendment. *American Mini Theatres*, 427 U.S. at 73 n.1 (Powell, J., concurring); *Avalon Cinema Corp.* v. *Thompson*, 667 F.2d 659, 663 n.10 (8th Cir. 1981) (en banc); Buchanan, *Toward a Unified Theory of Governmental Power to Regulate Protected Speech*, 18 Conn. L. Rev. 531 (1986). It is clearly *quite* restrictive to permit a business to engage in that protected expression only 20 percent of the time. To demonstrate the fallaciousness of the district court's reasoning, imagine an ordinance allowing book stores to sell nonfiction only if they limit nonfiction to 20 percent of their business. No one could argue that such an ordinance would not limit the sale of histories, biographies, newspapers and magazines.

A limitation of adult materials to 20 percent of a bookseller's wares conditions the constitutional right to speak in one way on the bookseller's willingness to speak in a different way 80 percent of the time. This is a severe restriction of first amendment rights. The Supreme Court has not permitted the states to condition even the right to drive a car on a person's willingness to express certain ideas, *Wooley* v. *Maynard*, 430 U.S.

705, 715 (1977); certainly the right to engage in one constitutionally protected form of expression cannot be conditioned on participation in other, government-approved, forms of expression. *See The Supreme Court —Leading Cases,* 100 Harv. L. Rev. 100, 182-90 (1986). We therefore reject the district court's conclusion that the distribution of adult books is not restricted by an ordinance which purports to regulate only strictly adult bookstores.[2]

Although the district court primarily relied upon the 20 percent exception to hold that the zoning ordinance was only incidentally restrictive, it also mentioned the city's "assertion" that numerous locations remained available for strictly adult bookstores. The court therefore distinguished this case from *Schad* v. *Mount Ephraim,* 452 U.S. 61 (1981), where an absolute ban on adult businesses was struck down. However, in *CLR* v. *Henline,* 702 F.2d at 639, this circuit held that an ordinance can be severely restrictive, and so subject to the analysis in *Schad,* even if it does not totally ban adult businesses. We therefore remand to the district court the question whether Ann Arbor's zoning ordinance severely restricts first amendment expression according to this court's analysis in *CLR* v. *Henline.*

Next we turn to the district court's findings on the issue of whether Ann Arbor's Zoning Ordinance was designed to serve a substantial government interest. Although both the Supreme Court in *Renton,* 106 S. Ct. at 931, and the Sixth Circuit in *CLR* v. *Henline,* 702

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2. Moreover, contrary to the dissent's assertion, no evidence in the record indicates that "scores of other businesses, all throughout Ann Arbor," now include, or in the future will include, adult materials as 20 percent or less of their total stock.

F.2d at 639, have stated that a city need not conduct new independent studies to justify adult business zoning ordinances, both courts have required some relevant evidence to demonstrate that the zoning ordinance was intended to address the secondary effects of adult businesses. The burden of proof is on the city to show that more than a rational relationship exists between the ordinance and this government interest. *Keego Harbor,* 657 F.2d at 97 n.3. In the case at hand, the district court's opinion notes only that the city "has asserted that its purpose in passing this ordinance is to prevent the concentration of adult businesses and resultant urban blight." 625 F. Supp. at 967. Upon careful review of the record in this case, we find no such "assertion," nor do we find any evidence of a legitimate government objective for the passage of this zoning ordinance. In the absence of any such evidence in the record, we conclude that the district court abused its discretion in finding that "the evidence that Ann Arbor has offered [is] sufficient justification for this ordinance." *Id.*

In light of the errors which led to the district court's holding that plaintiff was unlikely to succeed on the merits, we VACATE the district court's order denying the preliminary injunction and REMAND this case for further proceedings consistent with this opinion.

BAILEY BROWN, Senior Circuit Judge, concurring in part and dissenting in part. While it is true that a zoning regulation can be severely restrictive, and thus subject to the more laborious requirements in *Schad* v. *Borough of Mount Ephriam,* 452 U.S. 61 (1981), even if it does not totally ban adult businesses, *see CLR Corp.* v. *Henline,* 702 F.2d 637, 639 (6th Cir. 1983), I do not

believe that Ann Arbor's ordinance stringently limits first amendment free expression.

As the majority correctly notes, a case raising issues of a zoning ordinance's constitutionality must be decided according to its specific facts. In the present dispute, the ordinance at issue applies to only those businesses which have more than twenty percent (20%) of their stock in trade in adult materials. Thus, through scores of other businesses, all throughout Ann Arbor, whose stock in trade in adult materials may amount to 20% or less of their total stock, the public can have easy access to such materials. In so stating, I assume that if the demand is there, the businesses will accordingly respond.

Further, although adult businesses can operate in only a small percentage of the Ann Arbor area, their existence under the ordinance is simply not harshly restrained. The districts where the adult businesses may locate under the ordinance are in the heart of Ann Arbor within the city's central business zone—hardly a remote area. The districts seem to be commercially viable locations for adult enterprises and the plaintiff has not shown otherwise. The Ann Arbor ordinance merely regulates the location of such enterprises; it does not, for all practical purposes, eliminate them.

For the foregoing reasons, I therefore dissent from that portion of the majority opinion which remands for a determination in light of *CLR Corp.* v. *Henline* whether the ordinance poses a severe restriction.

However, I agree with the majority's conclusion that the district court abused its discretion in denying the plaintiff's motion for a preliminary injunction, since there

is no evidence in the record which demonstrates Ann Arbor's alleged purpose in enacting the ordinance to avoid urban blight. Upon remand, Ann Arbor may present proof of its alleged goal to justify what I view, under the present facts, as a slight infringement of first amendment freedom. In addition, the court may, at that time, determine whether the entitlement to injunctive relief may be denied for reasons other than the likelihood of success on the merits. *See Pascoe* v. *IRS*, 580 F. Supp. 649, 651 (E.D. Mich.), *aff'd mem.*, 755 F.2d 932 (6th Cir. 1985) (enumerates requirements for successful motion for preliminary injunction).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 85CV-60352-AA
HONORABLE CHARLES W. JOINER

KAREN CHRISTY, individually and as, sole shareholder of UNIQUE CREATIONS, INC., a Michigan corporation,
Plaintiff,

vs.

CITY OF ANN ARBOR, a municipal corporation, EDWARD PIERCE, individually and as Mayor of the City of Ann Arbor, and WILLIAM CORBETT, individually and as Chief of Police of the City of Ann Arbor,
Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the court on plaintiff's motion for a preliminary injunction. Plaintiff challenges the Ann Arbor City zoning ordinance as it pertains to adult bookstores. Plaintiff desires to open an adult bookstore in Ann Arbor and claims that the Ann Arbor zoning ordinance unconstitutionally prevents her from doing so. Plaintiff asks the court to temporarily enjoin the enforcement of the Ann Arbor zoning ordinance until this case can be decided on the merits.

There are two counts to the plaintiff's complaint. The first alleges that the zoning ordinances in question are unconstitutionally restrictive. Count II states that the Ann Arbor regulation is unconstitutionally vague and overbroad. Jurisdiction is based on 42 U.S.C. § 1983 and

the First, Fifth, and Fourteenth Amendments of the United States Constitution. For the reasons stated below, the plaintiff's motion for a preliminary injunction is denied.

FACTS

The plaintiff claims to have obtained a lease on a building in Ann Arbor with the intention of opening an adult bookstore. Plaintiff admits that the proposed site is not an area zoned for adult bookstores. She also admits that the bookstore will sell adult materials, as they are defined in the Ann Arbor zoning ordinance. Therefore, without a favorable ruling from this court, the plaintiff will be subject to civil liability if she opens her bookstore.

There is only one provision in the Ann Arbor City zoning code that is challenged by the plaintiff. The contested section, § 5:50, says:

> 5:50 *Regulations Concerning Adult Entertainment Businesses.*
>
> (a) Adult entertainment business: One or a combination of more than one of the following types of businesses: adult bookstore, adult motion picture theater, adult mini-motion picture theater, adult personal service business, adult novelty business.
>
> (b) Adult bookstore: An establishment having as a principal activity the sale of books, magazines, newspapers, video tapes, video discs and motion picture films which are characterized by their emphasis on portrayals of human genitals and pubic regions or acts of human masturbation, sexual intercourse or sodomy.

(c) Adult motion picture theater: An enclosed building with a capacity of 50 or more persons having as a principal activity displaying motion pictures characterized by their emphasis on portrayals of human genitals and pubic regions or acts of human masturbation, sexual intercourse, or sodomy for observation by patrons therein.

(d) Adult mini-motion picture theater: An enclosed building having as a principal activity the presentating [sic] of material characterized by emphasis on portrayals of human genitals and pubic regions or actions of human masturbation, sexual intercourse or sodomy for observation by patrons therein in individual viewing booths.

(e) Adult novelty business: A business which has as a principal activity the sale of devices of simulated human genitals or devices designed for sexual stimulation.

(f) Adult personal service business: A business having as a principal activity a person of one sex, while nude or partially nude, providing personal services for a person of the other sex on an individual basis in a closed room. It includes, but is not limited to, the following activities and service: massage parlors, exotic rubs, modeling studios, body painting studios, wrestling studios, individual theatrical performances. It does not include activities performed by persons pursuant to, and in accordance with, licenses issued to such persons by the State of Michigan.

(g) Partially nude: Having any or all of the following bodily parts exposed: buttocks, genitals, pubic area or female breasts.

(h) Principal activity: A use accounting for more than 20 per cent of a business' stock in trade, display space, floor space or movie display time per month.

(2) Locations of Adult Entertainment Businesses. An adult entertainment business may be located in the City only in accordance with the following restrictions:

(a) No such businesses shall be located within 700 feet of a district which, pursuant to this Chapter, has been classified R1A, R1B, R1C, R2A, R2B, R3, R4A, R4B, R4C, R4C/D or R6.

(b) Such businesses shall only be located in a district classified pursuant to this Chapter as C2A.

(c) No such business shall be established within 700 feet of another adult entertainment business.

(3) Use Regulations.

(a) No person shall reside in or permit any person to reside in the premises of an adult entertainment business.

(b) No person shall operate an adult personal service business unless there is conspicuously posted in each room where such business is carried on a notice indicating the prices for all services performed.

The principal disputed factual issue in this motion is the number of legal locations for adult bookstores in the City. Plaintiff relies upon the affidavit of a geographer to establish the lack of properly zoned places for adult bookstores. This geographer's calculations show that the total surface area of the city of Ann Arbor is 25.23 square miles. Out of this total, only .058 square

miles, or 23/100 of 1% of Ann Arbor, are available for locating an adult bookstore in compliance with § 5.50 of the Ann Arbor zoning ordinance.

The city of Ann Arbor responds that its ordinance is substantially different from those which have been successfully challenged in other cases. The primary difference is that § 5.50(1)(h) allows businesses to have up to 20% of their stock in trade, display space, floor space, or movie display time in adult materials, without subjecting that business to regulation under the zoning laws.

The city of Ann Arbor has two general areas which meet the requirements of its zoning ordinance. Neither party specifies how many adult bookstores could be placed in these two locations. The City asserts that there are numerous locations available. There are two existing adult businesses already located in the City.

Plaintiff's proposed location is at 207 North Main Street, which is inside a C2A zone. However, the location does not meet the other spacing requirements of the ordinance. Plaintiff states that she intends to sell more than the allowable 20% of adult materials in her store and will therefore be subject to the restrictions of the ordinance.

LEGAL ISSUES

There are four basic requirements that must be met for the plaintiff to obtain a preliminary injunction. *Pascoe* v. *I.R.S.*, 580 F.Supp. 649 (E.D. Mich.); *aff'd mem.*, 755 F.2d 932 (6th Cir. 1985). A party seeking a preliminary injunction must demonstrate (1) a likelihood of prevailing on the merits, (2) that a failure to grant the

request will result in irreparable harm, (3) that the ballance of hardships should the injunction be granted versus if it is denied favors the party seeking relief, and (4) that public policy militates in favor of the party seeking relief. *Id.* at 651. If plaintiff can meet these requirements on either of the two counts in her complaint, then she is entitled to a preliminary injunction.

OVERBROADNESS AND VAGUENESS

Count II of the complaint charges that the zoning ordinance is unconstitutionally overbroad and vague. The leading case on the effects of zoning restrictions upon first amendment rights is *Young* v. *American Mini Theater, Inc.*, 427 U.S. 50 (1976). The Supreme Court in *Young* considered the constitutional challenge of two adult movie theaters to zoning restrictions. In *Young*, the city of Detroit enacted an ordinance that required all adult establishments to be 1,000 feet or more from any other regulated use (which included other uses besides adult businesses) and more than 500 feet from any residential area. The term "adult" was defined in the ordinance in broad terms. The ordinances were adopted to combat the negative effects that concentrations of adult bookstores have upon the quality of neighborhoods in which they are located.

Five justices addressed the issue of the plaintiffs' standing to challenge the ordinance as unconstitutionally vague. They held that there was no uncertainty about the application of the ordinances to the plaintiffs because both theaters proposed to offer adult fare on a regular basis. *Young*, 427 U.S. at 59. They rejected plaintiffs' argument that they ought to be able to raise the vagueness issue because the ordinances affected communica-

tions protected by the first amendment. The court noted that there was an exception to this general rule which gave parties whose first amendment rights had not been affected by the ordinance standing to challenge its constitutionality. Nevertheless, the court continued, if the ordinance's deterrent effect on legitimate expression was not substantial and if the ordinance was readily subject to a narrowing construction by the state courts, then the litigant would not be permitted to assert the rights of third parties. *Id.* at 60.

The court decided that the Detroit ordinances had little deterrent effect on the exhibition of films protected by the first amendment. Moreover, in cases where there was doubt about the application of the ordinance, the Supreme Court believed that state courts could give a narrowing construction to it that would sufficiently reduce the uncertainty.

Applying this analysis to the facts of these cases, there is no doubt that the type and quantity of materials which plaintiff seeks to sell fall within the prohibitions of the Ann Arbor ordinance. Thus, the plaintiff is in the same position as the plaintiffs in *Young;* there is no uncertainty that this ordinance applies to her potential bookstore. Plaintiff must fall within the bounds of the exception stated in *Young* if she is to prevail. Plaintiff must establish that these ordinances have a substantial deterrent effect on protected speech or that they are not subject to a narrowing construction by the state courts. For similar reasons as the Supreme Court in *Young*, this court is not convinced that the ordinance in controversy here will have a significant deterrent effect on the sale of books protected by the first amendment.

Plaintiff's principal concerns about the ordinance's language are: how she will determine the amount of sexually explicit material she may have in stock before being considered an adult bookstore; whether nearby stores will suddenly decide to become competitors in the adult bookstore business and threaten her zoning permit by doing so; and how she will decide what constitutes adult material. On the basis of these claims, she contends that the ordinance is unconstitutionally vague.

From the facts alleged, however, the plaintiff will not be deterred much, if at all, by these problems. She has openly stated her desire to run a bookstore containing exclusively adult materials. If she obtains her zoning permit, the actions of new adult businesses are irrelevant because the new adult businesses will be the ones that will have to meet the zoning ordinance's restrictions to obtain a permit. There is also no reason that she could not seek state court decisions on these questions. Accordingly, the court believes that the plaintiff does not fall within the exception noted above and therefore lacks standing to challenge these ordinances as vague.

Plaintiff challenges the Ann Arbor ordinance as overbroad because it regulates businesses that carry more than 20%, but less than 100%, of their stock in trade, etc., in adult materials. Plaintiff argues that this is excessive regulation, declaring that a benchmark figure of more than 20% is required to pass constitutional muster in order to avoid deterring legitimate speech. There is no reason to believe that this plaintiff is affected by any alleged overbroadness in this ordinance. This is perfectly apparent from plaintiff's brief, where she claims that bookstore operators with less than an unspecified amount of sexually explicit materials may be subject to

its regulations. Plaintiff does not argue that there is any likelihood that her store will fall within this category of bookstores.

In *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973), the Supreme Court noted that the overbreadth doctrine is "strong medicine" and ruled that substantial overbreadth is a requirement to invoke the doctrine. *Id.* at 613-15. The Court went on to say that it would invalidate statutes for overbreadth, "only when the flaw is a substantial concern in the context of the statute as a whole." *Id.* at 616 n.14.

The court believes that the flaws that exist in the Ann Arbor ordinance are insignificant compared to its overall impact. This ordinance clearly has not deterred the plaintiff from trying to open her bookstore, nor other nonadult bookstores in Ann Arbor from carrying some adult materials. The court refuses to embrace plaintiff's speculation that substantial numbers of unknown businesses are being deprived of the opportunity to carry slightly more than 20% of their stock in trade, etc., in adult materials. The number of instances where this ordinance would be applied to such establishments is small in comparison to the number of applications to the law's legitimate targets. The court holds that the Ann Arbor zoning ordinance is not overbroad.

Accordingly, plaintiff's claims that these ordinances are vague and overbroad are rejected and Count II is dismissed.

UNCONSTITUTIONAL RESTRICTIVENESS

Count I of the plaintiff's complaint is again best addressed by the Supreme Court's analysis in *Young,*

427 U.S. at 63-73. Plaintiff mounts an equal protection attack similar to that in *Young*. In *Young*, the plaintiffs argued that the ordinances impermissibly regulated free speech by letting municipalities zone the locations of adult movie theaters. The Supreme Court reviewed its prior cases on time, place and manner regulations. The plurality opinion stated that regulation of expressive activity, predicated in whole or in part on the content of the communication, was permissible for certain qualified areas of speech. Given that a line could be drawn on the basis of content without violating the government's obligation of neutrality in its regulation of protected communication, and society's lesser interest in adult-oriented materials, the plurality held that the line drawn by the city of Detroit in its zoning ordinances was justified by its interest in preserving the character of its neighborhoods. *Id.* at 71-73. Thus, Detroit's desire that adult businesses be deconcentrated was accommodated.

In making this determination, however, the plurality left open an important loophole, the scope of which is disputed by the parties to this case. Footnote 35 of the *Young* opinion states that there is a possibility that certain regulations of the time, place, and manner of the distribution of adult materials could be unconstitutional. As the plurality noted,

> The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that "[t]he Ordinances do not affect the operation of existing establishments but only the location of new ones. There are myriad locations in the City of Detroit which must be over 1000 feet from existing regulated

> establishments. This burden on First Amendment rights is slight." 373 F.Supp., at 370. . . .

Young, 427 U.S. at 71-72 n.35.

Justice Powell, a fifth vote, approved of this footnote. *Id.* at 79.

The plaintiff in this case argues that the effect of the Ann Arbor zoning ordinance is to suppress or greatly restrict access to adult materials. Plaintiff believes that the ordinance operates to reduce the number of locations below the "myriad" available to prospective owners in Detroit after the *Young* case. In the plaintiff's eyes, any ordinance which restricts the number of locations below this level must be declared unconstitutional.

Footnote 35 seems to embrace two concepts of first amendment freedoms. There is a right of the people to obtain the kind of adult materials that the plaintiff wishes to distribute. There is also a right of the plaintiff to express herself by distributing the books she wishes to sell. As Justice Powell notes in his concurring opinion in *Young,* both rights have been before the Supreme Court at different times. However, he went on to say that the principal first amendment concern is the need to maintain free access of the public to the expression. *Young,* at 77.

Several years later, the Supreme Court had the opportunity to review the effects of zoning ordinances on first amendment rights. *Schad* v. *Mount Ephraim,* 452 U.S. 61 (1980). The borough of Mount Ephraim established zoning ordinances which effectively banned the exhibition of live nude dancing. When the operators of an adult bookstore started exhibiting this type of

dancing in coin operated viewing machines, they were charged and convicted of a criminal offense. The Supreme Court reversed.

The majority in *Schad* distinguished *Young*, saying that it was a case involving dispersal, not a ban, of adult businesses. Since the Mount Ephriam ordinance led to a total ban on live entertainment, including nude dancing, its impact on first amendment rights was much greater than in *Young*. *Schad*, 452 U.S. at 71 n.10.

The Supreme Court went on to hold that, in cases where a zoning ordinance imposed a total ban on first amendment activities, or severely restricted access to them, the ordinance must advance significant governmental interests without undue restraint of speech, or be struck down. *Id.* at 71-72.

A variety of terms have been used to describe the governmental interest that must be shown in order to justify restrictions on first amendment rights. *United States* v. *O'Brien*, 391 U.S. 367, 376-77 (1968). The burden of showing more than a rational relationship between the ordinance and the governmental interest rests upon the government. *Schad*, 452 U.S. at 72-73. Evidence must be introduced to show that the asserted interest is valid and will be advanced by the ordinance. Moreover, the zoning ordinance must be narrowly drawn. *Id.* at 68.

These are the two legal standards which the court must use in deciding this case. The *Young* analysis applies where the municipality is attempting to disperse adult businesses to minimize their undesirable side effects on its neighborhoods. The standard of *Schad*, on the other hand, is appropriate where the ordinance operates to exclude "speech" (books, pictures or other ex-

pression) from the area. *Basiardanes* v. *City of Galveston,* 682 F.2d 1203, 1213-1214 (5th Cir. 1982).

If, under *Young,* the court finds that the ordinance does not greatly restrict free speech, and the municipality makes some findings to support it, then that ends the inquiry into the constitutionality of the ordinance. However, if the ordinance greatly restricts free speech, then the *Schad* requirements must be satisfied if it is to pass constitutional muster.

The Sixth Circuit has recently decided two cases which bear directly on these issue. *See CLR Corp.* v. *Henline,* 702 F.2d 637 (6th Cir. 1982); *Keego Harbor Co.* v. *City of Keego Harbor,* 657 F.2d 94 (6th Cir. 1981). In *Henline,* the city of Wyoming, Michigan denied an adult bookstore owner's application for permission to open in the City at a location that violated its zoning ordinances. The Sixth Circuit struck down the ordinances, stating:

> The defendants have argued throughout this case that the Wyoming statute is constitutional because it is nearly identical to the statute upheld in *Young.* Both statutes impose 1000-foot and 500-foot spacing requirements on adult movie theaters and book stores although the requirements are triggered by one nearby restricted use in Wyoming versus two nearby restricted uses in Detroit. Despite the ordinance, Detroit contained a "myriad of locations" for such uses. In contrast, the impact of the Wyoming ordinance is to permit two to four restricted uses in a half-mile strip of the city. Like the Mt. Ephriam [sic] ordinance in *Schad* and unlike the Detroit ordinance in *Young,* the Wyoming ordinance *severely restricts* first amendment expression.

> Also like *Schad* but unlike *Young*, the defendants have failed to justify the infringement of constitutional rights by showing a compelling governmental interest. First, the Wyoming City Council made no factual findings that the spacing requirements would prevent urban blight. Wyoming need not have conducted its own research in this area. However, the district court found no evidence in City Council meetings or elsewhere that the ordinance was enacted *for the purpose of* preventing urban blight through deconcentrating restricted uses. It is equally likely that Wyoming enacted the ordinance to prevent adult books [sic] from locating in the city. Second, and more importantly, assuming Wyoming's purpose was to deconcentrate restricted uses, the *effect* of the ordinance is to *concentrate* any adult bookstores and theaters in the city into a 2,500-foot frontage. We decline to find a compelling governmental interest to justify this statute when Wyoming cannot demonstrate even a rational relationship between the asserted purpose and the effect of the statute.

Henline, 702 F.2d at 639 (emphasis in original).

Two conclusions can be drawn from this opinion. The City government did not need to make its own factual findings that spacing requirements would prevent urban blight. It was enough to show that the ordinance was enacted to prevent this type of blight, or at least to show that the ordinance was not enacted to prevent adult books from being sold in the City. Moreover, if the possible locations available for adult facilities are concentrated in one area, this undercuts any deconcentration rationale allegedly behind the ordinance.

In *Keego Harbor Co.* v. *City of Keego Harbor*, 657 F.2d 94, the City adopted an ordinance which imposed restrictions upon the location of adult entertainment facilities. The effect of the restrictions was to ban adult businesses from locating in the City. The Sixth Circuit found the ordinances to be unconstitutionally restrictive of first amendment rights. The court noted that the *Young* opinion controlled only where the ordinance served to regulate the place of adult businesses, without greatly restricting access to lawful speech. Because the ordinances imposed a ban on adult facilities, the court found that *Young* was inapposite. Instead it looked to the then recently decided *Schad* case. The court of appeals found that the City had failed to make an evidentiary showing that there was a sufficient justification to further a substantial governmental interest.

In its holding, the court of appeals stated that:

> In both *Young* v. *American Mini Theaters* and *Mount Ephraim* the Court looked first to the nature and extent of the zoning restriction. It then looked to the factual support for the restriction in order to determine whether the city had provided sufficient justification for imposing the restriction and whether the city had chosen the least restrictive alternative necessary to achieve the desired goals. When a city effectively zones protected activity out of the political entity, the justification required is more substantial than when the First Amendment burden is merely "incidental," as it was in *Young* v. *American Mini Theaters*.

Keego Harbor Co. v. *City of Keego Harbor*, 657 F.2d at 98. As this passage makes clear, the burden of proof placed upon the municipality varies with the level of restric-

tiveness of its ordinance. If the burden upon first amendment rights is "incidental", then the justification proffered by the municipality can be less substantial.

After reviewing these authorities and the evidence before it, the court finds that the Ann Arbor ordinance is not greatly restrictive of first amendment rights. Ann Arbor's unique provisions that allow businesses to have up to 20% of their stock in trade, etc., in adult materials, without imposing any zoning regulation, gives the public easy access to these materials. As Justice Powell noted in *Young*, the principal first amendment concern is the need to maintain free access of the public to these materials. *Young*, 427 U.S. at 77. The court is satisfied that the Ann Arbor ordinance meets this important obligation.

The Ann Arbor ordinance permits anyone to speak. By allowing stores to carry up to 20% adult wares, the ordinance guarantees the right of merchants to sell these materials. The city also shows that it has no evil intention to eliminate the sale of this kind of material. This answers the Sixth Circuit's concern that the City might have enacted the ordinance to prevent the sale of adult books. *Henline*, 702 F.2d at 639.

The 20% requirement provides a beneficial way for decentralization of the adult book business. By sanctioning the selling of adult books and other books together, the City has eliminated most of the well-known problems of urban blight that result from concentrations of these bookstores, without sacrificing its citizens' first amendment freedoms. There is no question that this ordinance allows a "myriad of locations" for the sale of adult books.

For those bookstores that wish to sell only adult books, thus violating the 20% requirement and subjecting themselves to regulation by the ordinance, the defendant City has provided two zones where these stores can locate. Plaintiff's evidence that these two zones comprise only a small percentage of the surface of the City is irrelevant. The relevant fact before the court is that the distribution of adult books is not limited by the ordinance authorizing zones for strictly adult stores. The court also notes that in an earlier case brought by this same plaintiff, a total of fourteen sites for adult bookstores were shown by the plaintiff to be available in the city of Ann Arbor. *See Christy Newsreel, Inc.* v. *City of Ann Arbor,* No. 83-1343, slip op. at 1 (E.D. Mich. Nov. 1, 1982), *aff'd,* No. 83-1343, slip op. (6th Cir. Nov. 11, 1985). Furthermore, the City asserts that there are numerous locations within it which are available for adult bookstores. The ordinance does not constitute an absolute ban on adult businesses under *Schad.*

The court finds that the incidental impact of this ordinance upon first amendment rights requires a lesser burden of proof for the City to justify its ordinance. *Keego Harbor Co* v. *City of Keego Harbor,* 657 F.2d at 98. The City has asserted that its purpose in passing this ordinance is to prevent the concentration of adult businesses and resultant urban blight. There is no requirement that the City actually make factual findings that such blight is caused by such concentrations. *CLR Corp.* v. *Henline,* 702 F.2d at 639. The court finds the evidence that Ann Arbor has offered to be sufficient justification for this ordinance. The ordinance also appears to be narrowly drawn to achieve its purpose. Adult materials remain freely available in the City, without offensive urban decay.

On the basis of these findings, the court finds that it is unlikely that the plaintiff will succeed in the merits of this action. Therefore, plaintiff's motion for a preliminary injunction against the enforcement of the Ann Arbor ordinance is denied.

SO ORDERED.

/s/ Charles W. Joiner
Charles W. Joiner
United States District Judge

Dated: January 15, 1986
Ann Arbor, Michigan

(Filed July 23, 1987)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-1172

KAREN CHRISTY, individually and as sole shareholder of UNIQUE CREATIONS, INC., a Michigan corporation, Plaintiff-Appellant,

v.

CITY OF ANN ARBOR, a municipal corporation, et al., Defendants-Appellees.

Before: JONES and BROWN, Circuit Judges; and RUBIN, Chief District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was submitted on briefs without oral argument.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby vacated and the case is remanded for further proceedings consistent with this opinion.

IT IS FURTHER ORDERED that Plaintiff-Appellant recover from Defendants-Appellees the costs on appeal.

as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF
THE COURT
John P. Hehman, Clerk
/s/ John P. Hehman
Clerk

Issued as Mandate: August 17, 1987

Supreme Court, U.S.
FILED
FEB 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-649

In The
Supreme Court of the United States
October Term, 1987

CITY OF ANN ARBOR, EDWARD PIERCE and WILLIAM CORBETT,

Petitioners,

v.

KAREN CHRISTY, Individually and as sole shareholder of UNIQUE CREATIONS, INC.,

Respondents.

PETITIONERS' REPLY BRIEF REGARDING PETITION FOR WRIT OF CERTIORARI

OFFICE OF THE CITY ATTORNEY

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TABLE OF CONTENTS

	Page
Index to Authorities	ii
Argument	1
The Petition for Certiorari Was Not Premature	1
Relief	3

INDEX TO AUTHORITIES

Page

CASES

United States v. Nixon, 418 U.S. 683, 41 L.Ed.2d 1039, 94 S.Ct. 390 (1974) 1

Young v. American Mini-Theatres, 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976) 1

ARGUMENT

I The Petition for Certiorari Was Not Premature.

Respondent has suggested that it would be premature to grant a writ of certiorari because the Court of Appeals merely reversed the District Court's denial of a preliminary injunction and remanded the matter for further proceedings. Certainly, it is good judicial policy to refrain from considering appeals of a lower court's discretionary rulings concerning interlocutory matters. However, this Court has not been hesitant to consider appeals prior to final judgment where important public policy questions need resolution or where resolution of the issue is necessary for proper consideration of the matter by the lower court. See *United States v. Nixon,* 418 U.S. 683, 41 L Ed 2d 1039, 94 S. Ct. 390 (1974).

Young v. American Mini-Theaters, 427 U.S. 50, 49 L Ed 2d 310, 96 S. Ct. 2440 (1976), was an appeal from the Sixth Circuit Court of Appeals decision which reversed the District Court's order granting a motion for summary judgment. Instead of requiring further proceedings by the District Court, this Court granted certiorari and reversed the decision of the Court of Appeals. Had a trial or other District Court proceedings been required prior to the issuance of a writ of certiorari, they would have to have been based on a constitutional interpretation exactly opposite that ultimately reached by this Court.

But for the fact that respondents appealed prior to the time the City could file a motion for summary judgment, this case is in almost the same posture as the *American Mini-Theaters* case was. If this case is remanded to the District Court prior to review by this Court, the hearing on the application for preliminary

injunction and the trial on the permanent injunction will have to be based on what Petitioners urge is a completely incorrect interpretation of the law. If the trial court is to obey the order of the Court of Appeals, it must reach its decision on whether there is an unconstitutional restriction on speech while totally ignoring the fact that the ordinance in question allows any retail business to stock and sell up to 20% of the "adult" materials in question.

In addition, if the opinion of the Court of Appeals is followed by the Trial Court, it will have to shift the burden to the City to "justify" its ordinance if an affidavit or other proof is presented showing that there is limited geographical area in Ann Arbor where businesses dealing only in "adult" materials can locate.

As a matter of public policy, the effect of the Court of Appeals decision on other courts and other cities cannot be ignored. In its present posture, this case has the potential of at least two more Court of Appeals' decisions before entry of a "final" judgment. In the meantime, other courts and other cities will be guided by a decision that simply is not warranted by the Constitution. Cities which clearly have no intention to suppress the speech involved in "adult" materials will be led to believe that the only way to accommodate the need for such materials is through an unlimited number of "adult bookstores."

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RELIEF

Petitioners respectfully request that this Court grant a writ of certiorari to consider the issues raised in the petition.

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February 5, 1988